

(1984) 08 CAL CK 0016
In the Calcutta High Court
Case No : C.O. No. 198 of 1984

Jugolinija Rajia Jugoslavija and Another	APPELLANT
Vs	
Fab Leathers Limited and Another	RESPONDENT

Date of Decision : 17-08-1984

Acts Referred:

Carriage of Goods by Sea Act, 1925 — Section 2
Carriage of Goods by Sea Rules — Rule 6

Citation : AIR 1985 Cal 193 : 89 CWN 9

Hon'ble Judges : Sudhir Ranjan Roy, J; Anil K. Sen, J

Bench : Division Bench

Advocate : Sudipto Sirkar, Dola Roychowdhury and Swapan Ash, for the Appellant; Sudhis Dasgupta and Amitabha Ganguly, for the Respondent

Final Decision : Allowed

Judgement

Anil K. Sen, J.—This revisional application raises a short point as to whether the plaintiff's suit is prima facie barred by law as against defendants Nos. 1 and 2 or not in view of Clause (vi) of Article 3 of the Rules adopted by the International Conference on Maritime Law commonly known as Hague Rules. The defendant Nos. 1 and 2 are the petitioners before us. The order impugned is one dated September, 30, 1983, passed by the learned Judge, 3rd Bench, City Civil Court, Calcutta, in Money Suit No. 186 of 1981. By the order impugned, the learned Judge has rejected an application filed by the defendant Nos. 1 and 2 under Order 7 Rule 11 of the Code for rejection of the plaint so far as they are concerned on the ground that it is so barred under the said clause. The defendant No. 1 is a company incorporated under the laws of Yugoslavia and defendant No. 2 is a local agent of defendant No. 1.

2. Since the disputed issue has to be decided only on the plaint it would be necessary to set out the plaintiffs case in material particulars. The plaintiff carries on business in manufacture and sale of leather products and for such business the plaintiff is required to import various leather chemicals including Sal

cromo A.B. Self basifying powder from Italy. Sometime in April 1979, plaintiff purchased some quantity of the said powder from Messrs. Laigi Stoppani, Italy, valued in Indian currency at Rs. 49,235.72. Packed in 160 bags those goods were despatched by the seller through defendant No. 1 under bill of lading No. 14 dated April 19, 1979. The goods were shipped by M. V. Baker having the flag of Yugoslavia. The ship arrived at the Calcutta Port on June 17, 1979. The goods delivered against the aforesaid bill of lading No. 14 dated April 19, 1979, was short by 80 bags. A short delivery certificate was issued on September 29, 1979. On October 25, 1979, the plaintiff lodged a claim with the defendant Nos. 1 and 2 for a sum of Rs. 24,642.86 for the value of the goods lost. Defendant Nos. 1 and 2 by their letter dated November 26, 1979, informed the plaintiff that the claim is receiving attention. A reminder being sent on February 26, 1980, defendant Nos. 1 and 2 further informed the plaintiff on March 5, 1980, that the matter is still under investigation. After 2 further reminders it is alleged that the defendant Nos. 1 and 2 informed by their letter dated April 21, 1980, that those 80 bags had since been traced and requested the plaintiff to collect the same from the port authority. The plaintiff, however, found those bags not to be the goods answering the description as in the bill of lading and a survey was held on May 29, 1980, as a result whereof the plaintiff could fully, finally and unmistakably determine the loss of the 80 bags. On that very day the plaintiff called upon the defendant Nos. 1 and 2 to finally settle their claim and though the defendant No. 1 on June 2, 1980, called for certain documents, ultimately refused to settle the claim lodged by the plaintiff. Hence, the plaintiff instituted the aforesaid money suit against the defendant Nos. 1 and 2 for recovery of the sum of Rs. 24,642.86 together with interest amounting in total to Rs. 32,775.01. In this suit, the defendant No. 3 was added as a party defendant as the insurer. The suit was filed on April 16, 1981.

3. It is not in dispute that Clause (vi) of Article 3 of the Hague Rules provides for absolute discharge for all liability for such loss so far as the shipper is concerned unless the suit is brought "within one year after the delivery of the goods or the date when the goods should have been delivered". It is also not in dispute that all the countries who participated in the Conference including India and Yugoslavia had adopted the said Hague Rules. So far as India is concerned, section 2 of the Indian Carriage of Goods by Sea Act, 1925, provides : "Subject to the provisions of this Act, the Rules set out in the Schedule thereafter referred to as the Rules) shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in India to any other port, whether in or outside India." The Schedule incorporates the Hague Rules. Ordinarily, this statutory provision would apply to outward carriage of goods from any port in India and not to carriage of goods from any port outside India to any port in India. We shall refer to this aspect further later in this judgment but we merely record that there is no dispute that Clause (vi) of Article 3 of the Hague Rules was adopted and was given statutory force without any amendment by the Indian Carriage of Goods by Sea Act, 1925.

4. At this stage it would be necessary to refer to the bill of lading. It is not disputed that the bill of lading incorporates the following Clause as a part of the contract for the carriage of the goods, namely, --

"(1) Paramount clause.-- The Hague Rules , contained in the International Convention for the Unification of certain Rules of law relating to bills of lading dated Brussels, the 25th August 1924, as enacted in the country of the flag of the ship shall apply to this contract. When no such enactment is in force in the country of the flag of the ship, the terms of the said Convention shall apply. Nothing contained in this bill of lading shall be deemed to be a surrender by the carrier of any of his rights of immunities or an increase of any of its responsibility under the said Rules or enactments under any other statutory protection or exemption from or limitation of liability.

In case some questions or relationship between the carrier and the merchant are not governed by the said International Convention for the Unification of certain Rules of Law relating to bills of lading as enacted in the country of the flag of the ship, the Yugoslav Law and in particular the Yugoslav Law concerning contracts for the employment of sea going ships shall apply."

5. In the application under Order 7 Rule 11 of the CPC defendant Nos. 1 and 2 took the stand that since the suit was filed beyond one year from the date of the delivery they stood discharged of their liability for the loss due to short delivery under the aforesaid term in the contract of carriage incorporating Clause (vi) of Article 3 of the Hague Rules. In paragraph 31 of the plaint the plaintiff pleaded that cause of action for the suit arose first on June 17, 1979, and thereafter on May 29, 1980, as also on various dates mentioned in paragraphs 14 to 26 of the plaint which contained the correspondence between the parties referred to hereinbefore. The application under Order 7 Rule 11 of the Code was strongly contested by the plaintiff on the ground that the plaint cannot be rejected so far as defendant Nos. 1 and 2 are concerned on the plaintiff's pleading itself and the question whether the suit is really barred or not must await taking of evidence on material points. The learned Judge by the order impugned has rejected the application under Order 7 Rule 11 of the Code and has upheld the plaintiff's objection holding that from the statements made in the plaint it cannot be said conclusively that the claim against the defendant Nos. 1 and 2 is barred by law and, as such, it will not be prudent at this stage without going into the evidence in details to reject the plaint on any such ground. Keeping open the issue as to whether the suit is really barred by law or not, he dismissed the application filed by the defendant Nos. 1 and 2. Feeling aggrieved, the defendant Nos. 1 and 2 have preferred the present revisional application.

6. Mr. Sarkar appearing in support of the present revisional application has strongly contended that since the defendant Nos. 1 and 2 stood discharged of their liability on the failure of the plaintiff to institute the suit within one year of the date of the delivery under the aforesaid clause of the contract of carriage incorporating the material clause of the Hague Rules, the learned Judge was in

error in thinking that the issue cannot be decided without evidence. According to Mr. Sarkar, the learned Judge really failed to appreciate the true effect of such a clause and did not apply his mind to the plaintiff's pleading itself to see whether on the case pleaded by the plaintiff it can be said that the claim as against these defendants stood barred in view of the said clause. Mr. Sarkar has objected to the manner in which the learned Judge has disposed of the important issue by merely observing that the question as to whether the suit is barred or not cannot be decided without evidence but not giving any reasons as to how evidence becomes necessary when on the plaint itself the delivery was pleaded with admitted shortage on the issue of the short delivery certificate on September 29, 1979. Strong reliance is placed by Mr. Sarkar on two decisions of the Supreme Court in the cases of *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*, and *American Export Isbrandtsen Lines Inc. and Another Vs. Joe Lopez and Another*, . . . Reliance is also placed by Mr. Sarkar on . . . Section 2 of the Indian Carriage of Goods by Sea Act, 1925.

7. Mr. Dasgupta appearing on behalf of the plaintiff made a great endeavour to support the order passed by the learned Judge. It has been strongly contended by Mr. Dasgupta that it is not possible to decide on the plaint itself as to whether the period prescribed for discharge of the liability really expired before one year prior to the suit; According to Mr. Dasgupta that period is to be counted from the date of the delivery or the date when the goods should have been delivered. In the present case, according to Mr. Dasgupta, evidence will be necessary to determine when the ship *M. V. Baker* actually left the Port of Calcutta because according to the Supreme Court decision in the case of *East and West Steamship Co. (supra)* that would be the last day when the goods should have been delivered for the purpose of calculation. The second point raised by Mr. Dasgupta is with regard to the paramount clause incorporated in the contract of carriage. Referring to that clause, it has been contended by Mr. Dasgupta that Hague Rules would apply only as enacted in the country of the flag of the ship. Hence, according to Mr. Dasgupta it would be necessary to know the law on the point enacted by Yugoslavia. Our attention being drawn to paragraphs 793 to 800 Halsbury's Laws of England, 4th Edition, Volume 43, it has been pointed out by Mr. Dasgupta that in England the material clause of the Hague Rules was adopted with a modification to the effect; "This period may, however, be extended if the parties so agree after the cause of action has arisen." Therefore, according to Mr. Dasgupta until it is known whether the law adopted by Yugoslavia incorporates any such modification or not it would be difficult to conclude that the plaintiffs claim is really barred.

8. We have carefully considered the rival contentions put forward before us. We cannot but accept the contention of Mr. Sarkar that the learned Judge in disposing of the application under Order 7 Rule 11 of the Code did not really consider the effect of Clause (vi) of Article 3 of the Hague Rules as adopted as a term of contract of carriage when he just disposed of the matter by holding that the issue raised cannot be decided without any evidence. Though Mr. Dasgupta in

his contention before us has suggested certain reasons as to how evidence becomes necessary, no reason whatsoever was assigned by the learned Judge in observing that the issue cannot be decided without evidence. In order to decide this point, therefore, it becomes necessary for us first to consider the first point raised by Mr. Dasgupta.

9 . The first point raised by Mr. Dasgupta is that even applying Clause (vi) of Article 3 of Hague Rules, it is not possible to determine the limitation without taking evidence with regard to the date when the goods should have been delivered. The material clause provides that the limitation for the statutory discharge of liability is expiry of a year "after delivery of the goods or the date when the goods should have been delivered." In our opinion in a case where the shipper delivers the goods acknowledging the loss by way of short delivery, the second alternative can have no application. In such a case it would be unreasonable to think that the goods can still be delivered and, therefore, the time will not run until the expiry of the date when the goods could have and as such should have been delivered. The second clause would apply only in case of non-delivery either of the whole or in part and the parties yet acting on an understanding that goods are still likely to be delivered.

10. Though strong reliance has been placed by Mr. Dasgupta on the observation of the Supreme Court in the case of *The East and West Steamship Company, George Town, Madras Vs. S.K. Ramalingam Chettiar*, . In paragraph 26 of the report, we are of the opinion that on the facts before the Supreme Court, the first alternative was neither pleaded nor was found to have any application. Those were also cases for short delivery but we do not find therein any case of acknowledgment of the loss and issue of a short certificate thereby acknowledging the inability to deliver the balance. Unlike carriage by Railways or other ordinary transport it was carriage by ship and there was no scope for delivery by instalments so that issue of a short certificate would not constitute an acknowledgment of inability to deliver the balance. Here upon plaintiff's own pleading the ship reached the port on June 17, 1979, the goods were delivered short and a short certificate was issued on September 29, 1979. It is also his pleading on the shipper's acknowledgment of such loss, he too put forward a claim of damages on October 25, 1979. In that background, it would be difficult to accept the suggestion of Mr. Dasgupta that the parties would yet be intending to deliver and receive delivery of the balance goods and, therefore, the last date when the goods should have been delivered should still be found out on evidence. No doubt reference was made by Mr. Dasgupta to the fact that on April 21, 1980, the defendants invited the plaintiff to take delivery of the balance 80 bags which were ultimately found to be not the goods covered by the bill of lading but that in our view would not alter the situation or derogate from the position that the goods once having been delivered with a short certificate dated September 29, 1979, period of limitation prescribed by Clause (vi) of Article 3 of Hague Rules must run from that date. That was not an offer in furtherance of any earlier promise or assurance to deliver the balance in a continuing process of

delivery. It was just a stray attempt to connect certain undelivered bags lying with the Port Commissioner with the plaintiff's goods which ultimately failed for not answering the goods covered by the disputed bill of lading.

11. Mr. Sarkar on his turn wanted to draw our attention to a certificate relied on by the defendants in support of their application that the ship left the port in July 1979, but we agree with Mr. Dasgupta that the said document cannot be taken into consideration because we have to decide the point on the plaint itself. But even then the court may taken judicial notice of the fact that no ship will stand waiting at the dock from June 17, 1979 until April 15, 1980, for the purpose of discharge of its cargo. Viewed from that angle it can very well be said even on the principles laid down by the Supreme Court in the aforesaid East and West Steamship Co. (supra) that the ship having left the port well before April 15, 1980, the period of limitation expired even if calculated with reference to the second alternative, namely, that the date when the goods should have been delivered.

12. We will now consider the second point raised by Mr. Dasgupta. Mr. Dasgupta is right in saying that the Hague Rules as enacted by Yugoslavia would be applicable under the terms of the contract of carriage. It is also true that save and except the fact that Yugoslavia too adopted the Hague Rules as would appear from the text relied on by Mr. Sarkar, it is not known to us the actual terms of their adaptation. But that is a question of foreign law and Mr. Sarkar has rightly contended that it was for the plaintiff to plead and prove what the foreign law on the point is and in the absence of any such pleading and proof the court is entitled to proceed by applying the domestic law, that is the law as in India. Reliance was placed on Dicey's Conflict of Laws, Chapter 36 Rule 210. Mr. Sarkar has also drawn our attention to the fact that the altered adaptation so far as England is concerned, is because of a supplementary agreement for revision of those Rules by some of the countries who were parties to the original Convention including England which are commonly known as Hague Vish by Rules. Our attention has been drawn to the fact that neither India nor Yugoslavia was a party to such revision and, as such, the adaptation in terms of such revision as in England is not to be found either in the law in India or in Yugoslavia. In our opinion, there is some force in this contention of Mr. Sarkar. When it is not disputed that the Hague Rules had been adopted by Yugoslavia and when the plaintiff has not pleaded that it had been so adopted with any material modification, it would be proper and reasonable for us to assume that the Hague Rules as they are had been adopted by Yugoslavia. Alternatively Mr. Sarkar is entitled to contend that the parties having failed to prove the actual terms of adaptation by Yugoslavia, we are entitled to decide the issue by applying our own law in this regard contained in Indian Carriage of Goods by Sea Act, 1925. The Indian Law was so applied by the Supreme Court in the later case of American Export Isbrandtsen Lines Inc. and Another Vs. Joe Lopez and Another, though the goods therein were shipped from a port outside India and were being carried to India.

13. Both the points thus raised by Mr. Dasgupta are overruled. We must necessarily accept the contention of Mr. Sarkar because on the plaint itself the suit having been instituted on April 16, 1981, it was so instituted long after the expiry of the period of one year from the date of delivery. Incidentally a point was sought to be raised by Mr. Dasgupta as to whether the claim would stand barred against defendant No. 2 as well or not but in our opinion on the averment made in the plaint there is no independent cause of action pleaded as against the defendant No. 2, the agent of the defendant No. 1. Nor is it the case of the plaintiff that the defendant No. 2 had any independent liability other than as the agent of the shipper, defendant No. 1. Hence, if defendant No. 1 stands discharged of its liability in the circumstances pointed hereinbefore, defendant No. 2 shall equally be so discharged.

14. Hence, the revisional application succeeds and is allowed. The suit being clearly barred against defendant Nos. 1 and 2, the Court cannot but reject the plaint under Order 7 Rule 11 of the Code, but the learned Judge refused to exercise the jurisdiction so vested in him upon a clear misapprehension of the terms of Clause (vi) of Article 3 of the Hague Rules which is also a part of the contract of carriage. Hence the impugned order should be set aside. Unless it is so set aside in exercise of our revisional powers it goes without saying that the defendants would suffer irreparable injury of defending a cause which is clearly barred as against them.

15. In the result this application succeeds. The impugned order is set aside. The application under Order 7 Rule 11 of the Code is allowed. The plaint so far as it is against the defendant Nos. 1 and 2 is rejected.

Sudhir Ranjan Roy, J.

16. I agree.